FAR PART -12
COMMERCIAL ITEMS

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OVERVIEW

- FAR PART 12 implements the preference for acquisition of commercial items which flow from Title VIII of Federal Acquisition Streamlining Act (FASA) of 1994 (Public law 103-355)
- Agencies are now required to buy commercial or non developmental items, to the maximum extent practicable
- Market research is essential to the acquisition of commercial items, and greater emphasis must be placed on the description of the supply or service

REFERENCES

- FAR PART: 7.102(a)(1), 10.001 (a)(3),12, 15.4, 32.2 52.212-4 and 52.212-5; (FAC 97-14, Sep 24, 1999)
- SMC/Center Of Expertise (COE) -LB 99-3 Market Research

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WHERE IN ACQUISITION CYCLE

- N/A

  - These principles are applied throughout the acquisition cycle

SPECIFIC INFORMATION

- Definition: Commercial Item (FAR 2.101)
- Why Commercial?
- Definition: Market Research
- Key questions to Market Research?
- Limitations: To Acquisition of Commercial Items FAR Part- 12
- Negotiate a Fair & Reasonable Price
- Terms & Conditions
- The Price Reasonableness Challenge of FAR Part-12
- Recent Changes (FAC 97-14, Sep 24, 1999)

Definition: Commercial Item (FAR 2.101)

- Customarily used for non-governmental purposes
  - offered/ sold, leased, or licensed to the general public
  - evolved from such a commercial item
    - as a result of technological advancement
  - *may* require modification customarily available in the commercial marketplace, or minor modifications for unique government purposes
  - is a combination of the above

continued…….

Definition: Commercial Item (FAR 2.101) (Cont.)

- installation, maintenance, repair, training services *for support of above described items*
- *non-developmental items* developed exclusively at private expense and sold to multiple state and local governments

Application To Commercial

- Statutory preference for commercial items (FASA)
- Attract new firms and state-of-the-art technologies
  - Reduce added cost and burden of complying with Government regulations
  - Declining DoD procurement budget
- Shorten response times
  - Use commercial practices to streamline acquisition process

GOAL: Increase the number of firms doing business, and thereby reduce prices thru expanded competition

Application
To Market Research

- Market Research: The collecting and analyzing of information about the market's capabilities to satisfy agency needs
- FAR Part 7.102*(a)(1)* Policy
  - Conduct Market Research for ALL Acquisitions to Promote and Provide for -- Acquisition of Commercial Items to Maximum Extent Practicable
- FAR Part 10 -- Market Research
  - 10.001 (a)(3) Use Market Research to Determine if Commercial Items or Non-developmental Items are available to meet the need of Agency's Requirements or could be modified to do so

Application To
Key Questions To Market Research

- Is there a commercial item that meets the requirements?
  - Request For Information (RFI)
  - Market Surveillance Review/ Reports
- Is there a commercial item that can be modified to meet the requirements?
- Can the requirements be modified to use a commercial item?
- If a commercial item isn’t available, are there commercial components that can be used in the item?
- Previous contract, market, or catalog
  - Prices,
  - Terms & Conditions

Limitations To: Acquisition of Commercial Items

FAR Part12

- Use Firm Fixed Price or Fixed Price contracts with Economic Price Adjustments.
  - Indefinite delivery contracts may be used when prices are based on above - 12.207
- Cost Accounting Standards (CAS) do not apply to the acquisition of commercial items by Firm Fixed Price and Fixed Price contracts with Economic Price Adjustments - 12.214
- FAR 15.4 is to be used to establish the reasonableness of prices when contracting by negotiation - 12.209

Negotiate a Fair & Reasonable Price

- Don’t be afraid to ask - MAKE A DEAL !!!
  - Negotiation is the name of the game
  - Don’t just accept catalog or market prices
    - Request discounts and best customer prices
    - Request more favorable terms and conditions
  - Understand there are trade-offs between price, payment terms , delivery schedules, and other T&Cs
    - Understand that they are all negotiable
  - Be aware of special needs, such as warranties.

Involve counsel (SMC/JAQ) who have been trained to interpret commercial contracts.

The Price Reasonableness Challenge of FAR Part 12

TINA Exception

- The Contracting Officer shall not require submission of cost or pricing data to support a determination of price reasonableness or cost realism for acquisition of a commercial item - 15.403-1(b)(3)

FAR Standard

- An acquisition for an item that meets the commercial item definition in FAR 2.101, or any modification that does not change the item from being commercial, is exempt from cost or pricing data requirements - 15.403-1(c)(3)

Terms and Conditions

- FAR 52.212-4 Contract Terms & Conditions - Commercial Items
  - Tailor to customary commercial practices
  - Uniform Commercial Code (UCC) applied *to purchase of goods*
- ***FAR 52.212-5 Contract Terms & Conditions Required to Implement Statutes or Executive Orders-Commercial Items***
  - ***Other required clauses/instructions might be required***

Terms and Conditions

Other Considerations

- Acceptance
- Price
- Payments
- Delivery
- Warranty
- *Assignments*
- Changes
- Termination
- Disputes
- Choice of law*

*See notes

Remember, you don't have protection of standard FAR clauses, everything must be spelled out in the contract. You lose, e.g. Stop Work Order authority, unless it is included in terms and conditions.

Terms and Conditions
Other Considerations (cont)

- Flexible contract financing under FAR 32.2
  - Commercial interim and advance payments
    - Not subject to Prompt Payment Act
      - ***Commercial practices (e.g. default) apply***
  - ***Must be factored into evaluated price***
    Consciously evaluate the need for things you are used to having automatically via the FAR clauses and won't have unless you require/negotiate them into the agreement.

RECENT CHANGES

FAC-97-14, Effective 24 Sep 1999

- The first two Techniques of price Analysis (FAR 15.404-1 (b) (2))

  -Comparison of proposed prices received in response to the solicitation

  -Comparison of previously proposed prices and previous Government & commercial contract prices for the same or similar items

- FAR 15.403-3 -- Requiring Information other Than Cost or Pricing Data from the contractor to Determine Price Reasonableness

Real Life Scenario

- Background: Delta II Rockets are used to lift medium weight satellites into space
- Relevant Data: Commercial contract was awarded to McDonnell Douglas Commercial Delta Co., using FAR Part 12 procedures
- Positive results
- F04701-98-C-0012

POSSIBLE BOARD QUESTIONS

- You are a PCO, and you cannot determine competitive proposed prices are fair and reasonable. What price techniques can the PCO use to determine price is fair and reasonable?
- What contract types shall agencies use to award acquisition of commercial items?

RELATED TOPICS & STUDY RESOURCES

- AFMC Commercial Acquisition Guide and Links to many other guides
  - http://www.afmc-mil.wpafb.af.mil/HQ-AFMC/PK/pkp/guides.htm
- HQ AFMC/PK Market Research/Commercial Acquisition Homepage and Commercial Pricing Homepage
  - http://www.afmc.wpafb.af.mil/HQ-AFMC/PK/pkp/pkpc/com-aq.htm
- I-Mart (Commercial Advocate Forum Home Page)
  - http://www.acq.osd.mil/ar/cadv.htm
- Federal Acquisition Institute's Acquisition Reform Training Module on Commercial Items
  - http://www.gsa.gov/staff/v/training.htm
- **Cornell Law School Legal Information Institute (primers)**
  - **http://www.cornell.edu/topics/contracts.html**